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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIABY Rm DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TERRIL MUNRO DIXON,

Petitioner,

v.

HERNANDEZ, Warden,

Respondent.

Civil No. 08-0040 WQH (NLS)

**ORDER DISMISSING CASE WITHOUT
PREJUDICE AND WITH LEAVE TO
AMEND**

Petitioner, a state prisoner proceeding pro se, has paid the \$5.00 filing fee and has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (West Supp. 2007).

FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

Habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the exhaustion requirement, a petitioner must “fairly present[] his federal claim to the highest state court with jurisdiction to consider it . . . or . . . demonstrate[] that no state remedy remains available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed

1 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state
 2 court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (emphasis added).

3 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
 4 Supreme Court. In fact, he specifically indicates he did not seek review in the California
 5 Supreme Court. (*See* Pet. at 6-9.) If Petitioner has raised his claims in the California Supreme
 6 Court he must so specify.

7 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 8 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 9 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation
 10 period shall run from the latest of:

11 (A) the date on which the judgment became final by the
 12 conclusion of direct review or the expiration of the time for seeking
 such review;

13 (B) the date on which the impediment to filing an application
 14 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

15 (C) the date on which the constitutional right asserted was
 16 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 17 applicable to cases on collateral review; or

18 (D) the date on which the factual predicate of the claim or
 19 claims presented could have been discovered through the exercise
 of due diligence.

20 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2007).

21 The statute of limitations does not run while a properly filed state habeas corpus petition
 22 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
 23 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 24 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 25 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 26 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 27 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

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1 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
2 habeas petition "[i]f it plainly appears from the face of the petition and any exhibits annexed to
3 it that the petitioner is not entitled to relief in the district court . . ." Rule 4, 28 U.S.C. foll.
4 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
5 habeas relief because he has not alleged exhaustion of state court remedies.

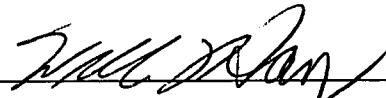
6 **CONCLUSION**

7 For the foregoing reasons, the Court DISMISSES this case without prejudice and with
8 leave to amend. If Petitioner wishes to proceed with this case, he must, no later than March 14,
9 2008, file a First Amended Petition which cures the pleading deficiencies outlined in this Order.

10 **THE CLERK OF COURT IS DIRECTED TO MAIL PETITIONER A BLANK FIRST**
11 **AMENDED PETITION FORM.**

12 **IT IS SO ORDERED.**

13 DATED: 1/14/08



14 William Q. Hayes
15 United States District Judge
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